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# Torts--Wrongful Birth and Wrongful Life

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the applicant can show that no person will realize any gain or profit from the operation of the organization; that an indefinite number of persons will benefit from the use of the property; and that the property is used exclusively for charitable purposes within the meaning of *Salvation Army*. The Missouri Supreme Court over the years has demonstrated a tendency to increase the class of exempt property, liberalizing their interpretation of the statute. However, this class expansion has been modest and, when compared with other states, the Missouri courts can be considered conservative. The conservative approach manifests itself in the clear indication that no partial exemption will be granted by judicial action. The reform must be legislative.

ROBERT P. BALLSRUD

# TORTS—WRONGFUL BIRTH AND WRONGFUL LIFE

*Park v. Chessin*[1]

In June, 1969, Hetty Park gave birth to a baby who lived only five hours. The cause of death was determined to be polycystic kidney disease, a fatal hereditary disease of such a nature that there exists a substantial probability that any future baby of the same parents will be born with it.[2] Park and her husband alleged that immediately after the death of this infant they sought the advice of the defendant obstetricians, who advised them that the chances of having any future baby with polycystic kidney disease were "practically nil" inasmuch as the disease was not hereditary. In reliance on the defendants' assurances, the plaintiffs conceived a second child, which was delivered in July, 1970. Contrary to the defendants' assurances, this child too was born with polycystic kidney disease. The child survived for two and one-half years, and during her short lifespan endured physical pain and suffering from polycystic kidneys as well as other diseases.

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members; until the plaintiff has paid the cost of its own entertainment, and goes out and finds her, and hands her whatever it may have left in its pocket.

1. Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977); *modifying* 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976) (dismissed the mental suffering element of plaintiffs' claim).

2. 4A R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 286.65 (1972).

The parents brought a lawsuit on their own behalf claiming damages for medical expenses, emotional distress,[3] and loss of the wife's services incident to the birth and care of the second child. In addition, as the legal representatives of the child, the parents brought suit to recover for the child's physical pain and suffering.

The trial term of the Supreme Court of New York denied the defendants' motion to dismiss,[4] and the appellate division affirmed and held that both the parents and the child stated a cause of action.[5]

The *Park* case involves two similar yet distinct types of actions: "wrongful life" and "wrongful birth." Although many courts have employed the terms interchangeably, "wrongful life"[6] will be used to denote an action brought *by a child* claiming injury because of the failure to prevent its birth, whereas "wrongful birth" will denote an action brought by the *parents* or *prior born children.*[7] As the two types of actions have received considerably different treatment by the courts, it is important to distinguish them.[8]

Wrongful birth and wrongful life cases also differ from ordinary prenatal tort cases. In wrongful birth and wrongful life cases it is not contended that the defendant did or failed to do anything to cause the damaged condition of the child, as in ordinary prenatal tort cases. Rather, the allegation in wrongful birth or wrongful life suits is that the defendant's negligence resulted in the birth of an infant who otherwise would not have

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3. The appellate division granted defendant's motion to dismiss as to this element of the plaintiff's cause of action. This limitation upon the proper elements of recovery is based upon Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977). In *Howard* parents sued a doctor for failing to detect that their unborn child had Tay-Sachs disease. In dismissing the parents' claim for mental anguish, the court treated them just as though they were mere bystanders, and hence not within the "perimeter of liability." This result was due to New York's strict limitations upon the negligent infliction of mental suffering theory of recovery. *Id.* at 116, 366 N.E.2d at 68, 397 N.Y.S.2d at 367, 368 (Cook, J., dissenting).

4. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976).

5. 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

6. The term "wrongful life" has its origin in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 259, 190 N.E.2d 849, 858 (1963), *cert. denied,* 379 U.S. 945 (1964). In *Zepeda* the suit was brought by a *child* against his father for damages claimed by reason of his illegitimate birth. *See also* Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (suit brought *by the parents* was not a suit for "wrongful life").

7. *See* Aronoff v. Snider, 292 So. 2d 419 (Fla. Dist. Ct. App. 1974) (prior born children do not have a cause of action for the dilution of their interests by virtue of the wrongful birth of a fourth child).

8. *See* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Karlsons v. Guerinot, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977); Dumer v. Saint Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). In each of these cases the courts were faced with both wrongful life and wrongful birth claims. All three recognized the cause of action for wrongful birth but denied the claim for wrongful life.

been born.[9] Due to the different problems inherent in the wrongful birth and wrongful life theories, this note will deal with them individually, looking first at the wrongful birth cases, then at the more difficult problem of wrongful life cases.

Wrongful birth cases have arisen in a number of different fact situations. Parents of defective children, who were ill advised of the risk of birth defects, have brought suit claiming injury in that they would have aborted the pregnancy[10] or avoided conception had they been properly informed.[11] Conversely, parents of healthy, but unplanned, children have brought suits against surgeons for negligently performing sterilizations,[12] against doctors for negligently failing to diagnose pregnancy within a reasonable time,[13] and against pharmacists for negligently filling prescriptions for oral contraceptives.[14]

The results plaintiffs have achieved in pursuing the wrongful birth theory have been as varied as the fact situations under which such claims arise. Some courts, particularly in the early cases, have flatly refused to allow recovery on this theory.[15] Other courts have recognized the cause of

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9. Comment, *Howard v. Lecher: An Unreasonable Limitation on a Physician's Liability in a Wrongful Life Suit,* 12 NEW ENGLAND L. REV. 819, 820 (1977).

10. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Karlsons v. Guerinot, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. Saint Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). *See also* Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (1968), *modified,* 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *aff'd mem.,* 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972) (doctors refused to grant plaintiff an abortion). The continued validity of *Stewart* is doubtful in light of *Park.*

11. Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976), *modified,* 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977).

12. *See generally* Annot., 83 A.L.R.3d 15 (1978); Annot., 27 A.L.R.3d 906 (1969). Two cases have involved the birth of impaired children. LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976) (recovery related to defects denied because birth of an abnormal child was not foreseeable at the time of the tubal ligation); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976) (due to faulty tubal ligation mother gave birth to twins; one healthy and one deformed; judgment for $462,500 affirmed).

13. Ziemba v. Sternberg, 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974) (stated a cause of action); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (recovery denied); Annot., 83 A.L.R.3d 15, § 18 (1978).

14. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971) (normal tort recovery should be allowed).

15. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957). *Compare* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (no cause of action for the wrongful birth of a healthy child) *with* Dumer v. Saint Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (partial recovery recognized for wrongful birth of defective child).

action, but limited the measure of damages,[16] while some courts have denied motions to dismiss without discussing damages.[17] Although there are still recent decisions denying recovery,[18] the trend appears to be toward recognizing wrongful birth actions and allowing plaintiffs to recover the normal measure of tort damages.[19]

The wrongful birth cause of action first appeared at a time when abortions were illegal and birth control was frowned upon. Early decisions often were influenced by considerations of whether sterilization was

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16. Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967) (wrongful birth claim stated a cause of action for mother's physical pain and suffering, as well as the costs of the birth); Coleman v. Garrison, 349 A.2d 8 (Del. 1975) (cost of raising a healthy child could not be recovered; defendant conceded that pain and suffering of the mother, medical expenses of pregnancy, cost of sterilization operation and the loss of consortium were proper damages); Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977) (parents can not recover damages for *their mental anguish* caused by the wrongful birth of a defective child); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (damages for the wrongful birth of a *defective child* limited to the burden related solely to the defective condition); Garwood v. Locke, 552 S.W.2d 892 (Tex. Ct. App. 1977) (cause of action for wrongful birth permits at least the recovery of the medical expenses incident to the birth of a *healthy child*).

17. Jackson v. Anderson, 230 So.2d 503 (Fla. Dist. Ct. App. 1970).

18. Since January 22, 1973, the date Roe v. Wade, 410 U.S. 113 (1973) invalidated statutes prohibiting abortion in the first trimester of pregnancy, there have been six decisions denying a cause of action for wrongful birth. LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976); Coleman v. Garrison, 349 A.2d 8 (Del. 1975) (recovery of the costs of rearing a healthy child was the sole issue); Greenberg v. Kliot, 47 App. Div. 2d 765, 367 N.Y.S.2d 966 (1975); Clegg v. Chase, 89 Misc. 2d 510, 391 N.Y.S.2d 966 (Sup. Ct. 1977); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Ct. App. 1973), *cert. denied,* 415 U.S. 927 (1974) (recovery of the costs of rearing a healthy child was the sole issue); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974). *Greenberg* and *Clegg,* however, can no longer be considered valid authority in the light of Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977). Moreover, *Rieck* has been limited by the later decision of Dumer v. Saint Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (allowing recovery in the case of a defective child), and *Terrell* has been narrowly interpreted by two subsequent cases. Jacob v. Theimer, 519 S.W.2d 846 (Tex. 1976) (allowing recovery in the case of a defective child); Garwood v. Locke, 552 S.W.2d 892 (Tex. Ct. App. 1977) (narrowly reading *Terrell* as precluding only the recovery of the costs of rearing the child).

19. *See* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (1976); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *modified,* 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977) (denying only the mental suffering claim of parents); Karlsons v. Guerinot, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977); Cox v. Stretton, 77 Misc. 2d 155, 352 N.Y.S.2d 834 (Sup. Ct. 1974).

 

against public policy[20] or whether abortion was legally available.[21] The difficulties with the law in this area have been compounded by the fact that recent cases continue to rely on these earlier decisions without sufficiently considering the continuing validity of their arguments or whether they fit the fact situation before the court.

In the leading case of *Gleitman v. Cosgrove,*[22] the parents of a physically impaired child brought suit against their doctor for falsely advising them that rubella, which had been contracted by Mrs. Gleitman in the first month of pregnancy, would have no effect at all upon their child. The plaintiffs claimed that had they known of the risk of birth defects, they would have aborted the pregnancy. In their complaint they asked the court to award them damages for their mental suffering, as well as the cost of rearing the child. In upholding the dismissal of the plaintiffs' complaint, the court stated that public policy[23] and the difficulty of measuring damages[24] precluded recognition of a wrongful birth cause of action. These two factors have been the major stumbling blocks which plaintiffs have encountered in pressing forth their claims.

At the time *Gleitman* was decided, the law in New Jersey provided criminal sanctions for all abortions performed "without lawful justification."[25] Although the majority in *Gleitman* assumed arguendo that a lawful abortion would have been available somehow or somewhere, they nevertheless indicated that there was serious doubt as to the legality of eugenic abortions[26] in New Jersey. Against this background, the court concluded that public policy prohibited the recognition of a claim which, in essence, demanded damages for denial of the opportunity to take an embryonic life.

The true meaning of the *Gleitman* policy argument lies between the lines. The court did not wish merely to exalt the value of life. Rather, the court wanted to avoid expanding the categories of lawful abortions. To have allowed recovery in *Gleitman* would have been tantamount to ruling *sub silentio* that eugenic abortions were lawful in New Jersey.[27] The majority strongly insinuated, however, that such abortions were not legal.

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20. Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).
21. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).
22. *Id.*
23. *Id.* at 31, 227 A.2d at 693.
24. *Id.* at 29-30, 227 A.2d at 693.
25. N.J. REV. STAT. § 2A:87-1 (1951).
26. Abortions performed to prevent the birth of an impaired fetus.
27. In certain matters of public policy a court must look only to the statutes of the forum's state. Thus, even though the Gleitmans may have been able to obtain a lawful abortion elsewhere, the court in *Gleitman* was constrained to follow the policy of New Jersey statutes. If the law of New Jersey prohibited eugenic abortions, it would have been improper to denigrate the policy of the legislature by allowing a cause of action for wrongful life. *See* 12 ST. LOUIS U.L.J. 155, 157-58 (1967).

Undoubtedly they realized that such language would serve to deter reputable physicians from performing such abortions. Thus, they were able to achieve their unspoken purpose of protecting embryonic life, without reaching the issue whether criminal sanctions would be imposed on a doctor who performed a eugenic abortion in good faith.

The policy argument of *Gleitman* has been substantially weakened by the legalization of abortion.[28] Absent the threat of criminal liability, the *Gleitman* policy would have little or no effect upon the number of abortions performed[29] and hence would amount to little more than lip service favoring child birth over abortion.[30] The general policy favoring compensation of injured parties should not be set aside in deference to the personal views of judges.

The second reason given in *Gleitman* for denying a wrongful birth cause of action was the problem of measuring damages. Every court which

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28. Anti-abortion statues such as the one in New Jersey at the time of *Gleitman* have been invalidated by the United States Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973). States may not impinge upon a woman's decision to obtain an abortion absent a compelling state interest. The state's interest in protecting the child does not become "compelling" until the child is capable of meaningful life outside the womb. 410 U.S. at 163. This raises several interesting constitutional questions which are beyond the scope of this note. One such question is whether the endorsement of a policy which allows recovery for all types of malpractice *except* wrongful birth would constitute an unconstitutional infringement of the rights of the parties. Two cases have suggested that it would. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1975); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). The problem is finding sufficient state action. *See* Bell v. Maryland, 378 U.S. 226, 306-12 (1964) (Goldberg, J., concurring), which suggests that the denial of a remedy may be state action. In Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) the Court stated that the state did not have the authority to give a third party the right of veto power over the abortion decision of a physician and his patient. Reading *Planned Parenthood* along with the language of Doe v. Bolton, 410 U.S. 179, 197 (1973), which states that a woman is entitled to "receive medical care in accordance with her licensed physician's best judgment," suggests that a state may not relieve a doctor of his duty of rendering medically sound advice so as to make him a surrogate of the state in discouraging abortions. *See also* Colautti v. Franklin, 47 U.S.L.W. 4094 (1979).

29. Denial of a cause of action for wrongful birth would reduce the number of eugenic abortions only if doctors are thereby encouraged to be negligent, so as to fail to disclose the risk of defects, or if they are permitted to intentionally withhold such information. Courts would not consciously wish to encourage negligence in any aspect of prenatal care as this type of conduct also would adversely affect the chances of detecting treatable diseases. To permit intentional concealment of such information, on the other hand, would fly in the face of the mother's constitutional rights. *See* note 28 *supra.* Moreover, the only children "protected" would be those who were likely to be impaired. The *Gleitman* policy would have no effect upon the number of abortions obtained for so-called "soft" reasons, *e.g.*, simply to control family size or avoid unwed motherhood.

30. The policy of *Gleitman* is considered inapplicable to cases involving contraception, as opposed to abortion. Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975), *contra*, Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110, 116 (1977) (Titone, J., dissenting).

 

has denied recovery for wrongful birth has based its decision to some degree upon the problem of fixing damages.

Some courts have encountered problems with the question of damages because of their failure to apply basic damage principles. The normal procedure in tort cases in which a defendant's act causes injury while also bestowing a direct benefit is to allow the trier of fact to offset the value of the benefit against the damages attributable to the injury.[31] By failing to recognize the applicability of this "benefits rule" to wrongful birth actions, some courts have denied recovery on the ground that permitting parents to retain the "benefits" of parenthood while shifting the costs to the doctor would be wholly out of proportion to the culpability involved and would place an unreasonable burden upon physicians.[32] While there is nothing unreasonable about holding a physician liable for the foreseeable consequences of his tortious act, it would be inequitable to allow unjust enrichment of the parents—if they in fact received any "benefit"—at the expense of the medical profession. Application of the benefits rule, however, undercuts this objection by allowing the benefit of being "blessed" with a child to be considered by the trier of fact in assessing damages.

In most wrongful birth cases, as in *Gleitman,* the courts do recognize the propriety of offsetting the benefits of parenthood against the so-called "hard money damages."[33] Once the benefits rule is recognized as applicable, the plaintiffs in wrongful birth cases have then been confronted with the arguments that there are no damages as a matter of law,[34] or that damages are too speculative to permit recovery.[35]

The argument that there can be no injury by virtue of the birth of a healthy child may be a reasonable statement of personal values, but it is an untenable position for the law to take. Judge Levin, writing the opinion of the court in *Troppi v. Scarf,*[36] rejected such an argument by stating:

> Contraceptives are used to prevent the birth of healthy children. To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.[37]

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31. Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); D. DOBBS, REMEDIES § 3.6 (1973); RESTATEMENT OF TORTS § 920 (1939).

32. Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

33. Damages would include, *inter alia,* the cost of food, clothing, education and medical care.

34. Terrell v. Garcia, 496 S.W.2d 124 (Tex. Ct. App. 1973), *cert. denied,* 415 U.S. 927 (1974).

35. *E.g.,* Coleman v. Garrison, 349 A.2d 8 (Del. 1975).

36. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

37. *Id.* at 253, 187 N.W.2d at 517.

Although it may be that in some instances the birth of even an unplanned child will confer so substantial a benefit on the parents as to outweigh the expense of its birth and care, such should not be made an irrebuttable presumption of law.

A few courts have suggested that there can be no recovery for the expense of rearing a child because the parents could have mitigated or avoided such damages by placing the child for adoption.[38] This ignores the principle that recovery is denied only for harm which could be *reasonably* avoided.[39] Once a child is born, there is a strong sense of obligation to see that the child receives a proper upbringing. The law has long recognized the special interest of a child in remaining with its natural parents.[40] A tortfeasor is in no position to demand that parents part with a child when strong social and emotional convictions may compel otherwise.[41] Moreover, such a policy will inure to the detriment of the child who must be placed for adoption to avoid the unwanted burden. At best, the tortfeasor should only be allowed to show that the parents have acted unreasonably. This is a question for the trier of fact and should not be grounds for withholding the case from the jury.

Even if it is conceded that damages exist, some courts have nevertheless denied recovery because of the difficulty in measuring damages.[42] This too is a misapplication of basic damage principles. The "certainty rule" of damages refers to the *fact of damages,* not to their amount.[43]

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38. Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

39. *See generally* 25 C.J.S. *Damages* § 33 (1966).

40. *See, e.g.,* Vance v. Vance, 203 S.W.2d 899 (St. L. Mo. App. 1947); 67 C.J.S. *Parent and Child* § 12 (1950).

41. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971):

> While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort (even if legal) or place her child for adoption.

*Id.* at 260, 187 N.W.2d at 520.

42. Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Terrell v. Garcia, 496 S.W.2d 124 (Tex. Ct. App. 1973), *cert. denied,* 415 U.S. 927 (1974).

43. *See, e.g.,* City of Kennett v. Katz Constr. Co., 273 Mo. 279, 202 S.W. 558 (1918):

> [I]n applying the rule against the recovery of uncertain damages, it is the uncertainty as to their nature and not as to their measure or extent that is meant. . . . The manner of measuring the damages having been ascertained, impossibilities in proving same are not required, but only that the best evidence be adduced, of which the nature of the case is capable; in other words, the degree of certainty of proof is dependent upon the character of the proceeding.

*Id.* at 292-93, 202 S.W. at 562. *See generally* 22 AM. JUR. 2d *Damages* § 2 (1965).

When parents have an unplanned child they incur such damages as the cost of rearing the child, medical expenses, and loss of the wife's services. The mere fact that the defendant is entitled to have the value of the benefit to the parents offset against the damages does not make these damages uncertain. Even though in some cases the value of the benefit conferred may totally offset the damages for the injury inflicted, this is no basis for a nonsuit. The value of the benefit conferred is a question for the trier of fact, hence it is improper to consider this value in ruling on a motion to dismiss or a motion for a directed verdict.[44] Moreover, the determination of net damage should not be an insurmountable task; juries deal with intangible damages every day. The argument that the "complex human benefits of motherhood and fatherhood" are immeasurable is wholly unpersuasive, especially in light of the fact that in several jurisdictions such damages are recoverable for the wrongful death of a child.[45]

In addition to the two primary arguments against allowing recovery for wrongful birth, *Rieck v. Medical Protective Co.*[46] has interposed two additional arguments: the risk of fraudulent claims and the belief that the recognition of a wrongful birth cause of action would place an unreasonable burden upon the medical profession.

The fear of fraudulent claims is unrealistic in many situations in which wrongful birth claims arise.[47] Moreover, the notion that bona fide claims should be denied because of the possibility of fraudulent claims is indicative of a lack of faith in the jury system.[48] *Park* flatly rejected this argument and expressed its faith in the judiciary's ability to "sift the wheat from the chaff."[49]

As for the burden upon the medical profession, the courts have failed to disclose what social policy would be furthered by immunizing doctors

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44. *See* Troppi v. Scarf, 31 Mich. App. 240, 257; 187 N.W.2d 511, 519 (1971).

45. *See* Annot., 14 A.L.R.2d 485, § 6 (1950).

46. 64 Wis. 2d 514, 219 N.W.2d 242 (1974). *See also* Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110, 118 (1977) (Titone, J., dissenting).

47. *Rieck* involved a doctor's failure to correctly diagnose the plaintiff's condition as pregnancy. By the time a correct diagnosis was obtained, plaintiff contended that it was too late to abort. The court undoubtedly realized that there was a substantial likelihood that, having been given the opportunity to decide, the parents may have changed their minds and allowed the child to be born. However, in situations where an abortion would have been sought because of the strong likelihood of defects, the probability that the parents would have aborted is much greater. Absent the showing of strong religious considerations, it might be presumed that an abortion would be obtained where grievous defects are likely.

48. *See, e.g.*, Steggal v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (En Banc 1953). The difficulty plaintiff may have in proving his case and the risk that the cause of action may at times give rise to fraudulent claims are not sufficient reasons for denying a cause of action. "If a plaintiff cannot prove his case, no judgment will be permitted to stand." *Id.* at 1234, 258 S.W.2d at 580.

49. 88 Misc. 2d at 232, 387 N.Y.S.2d at 211.

from some aspects of liability for their tortious conduct. Tort immunity should be granted only where there are overriding social interests. There does not appear to be any valid basis for granting preferential treatment to the medical profession over other professions in which malpractice can result in liability for damages.[50]

Although much has been said about why recovery should be denied, little has been said about the rights to be protected. When a patient consults her physician, the physician is required to conform to the standard of care generally exercised by the members of his profession. This is true whether the physician is rendering care or merely giving advice.[51] If the doctor fails to exercise the required degree of care and as a result an unplanned child is born, the question is simply who should bear the resulting loss. The costs of raising a child can be a heavy burden. The allocation of resources function of tort law is just as applicable to wrongful birth as to any other tort. To the extent that tort law encourages conformity with the standard of care imposed, the general societal interest in proper medical care also will be furthered. It is the emotional connotations of family planning that have been the major bar to wrongful birth actions, rather than sound legal principles. The more recent cases, however, show an increasing tendency to treat wrongful birth as just another tort claim.[52]

In considering the wrongful life type of action, one is first confronted by the fact that, unlike wrongful birth, there is nothing which even remotely resembles a trend toward the recognition of a wrongful life cause of action. Prior to *Park,* eleven cases involving wrongful life had made their way into the courts, and in each of these cases recovery was denied.[53]

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50. *Id.* at 231-32, 387 N.Y.S.2d at 211.

51. *See, e.g.,* Aiken v. Clary, 396 S.W.2d 668, 673 (Mo. 1965). The relationship between a doctor and patient is one of trust and confidence; the doctor is thus required to disclose such information as is in the patient's best interests to know. Annot., 49 A.L.R.3d 501 (1973).

52. *See* cases cited note 19 *supra.*

53. Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Pinkey v. Pinkey, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967), *overruled on other grounds,* 300 So. 2d 668 (Fla. 1974); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Johnson v. Yeshiva Univ., 42 N.Y.2d 818, 364 N.E.2d 1340, 396 N.Y.S.2d 647 (1977) (court affirmed dismissal upon the grounds that no issue of negligence existed for the jury); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966); Karlsons v. Guerinot, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977); Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *appeal dismissed mem.,* 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863 (1970) (implicitly overruled by *Park*); Dumer v. Saint Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974); Annot., 83 A.L.R.3d 15 (1978). *See, e.g.,* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

 

*Park* is the first appellate level court to uphold a wrongful life cause of action.

There are basically two types of wrongful life cases. One type is the so-called "bastard cases," which involve children born out of wedlock who claim injury by virtue of their illegitimate status. The fact situations under which these cases arise make them very poor vehicles through which to argue for the creation of a new cause of action.[54] Unfortunately the first two wrongful life cases were bastard cases.[55]

The second type of wrongful life cases are those which involve children born with serious mental or physical defects.[56] At present, only physicians have been defendants in these lawsuits. The basis of the complaint in this type of wrongful life case is that the doctor's negligence prevented the mother from exercising her judgment, on behalf of the child, to avoid conception or to abort.

In various opinions dealing with wrongful life, the courts have articulated four general bases for denying the wrongful life cause of action: (1) the cause of action would have wide ranging social ramifications,[57] (2) social policy,[58] (3) lack of damages,[59] and (4) immeasurability of damages.[60] Each of these arguments will be examined, along with the cases which pronounced them.

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54. These cases have all been suits against the father. Undoubtedly they are spurred by the bastards' limited statutory rights to support, and perhaps as acts of reprisal by the disgruntled mothers.

55. Although the term "wrongful life" had its origin in a bastard case, Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964), most bastard cases are not true wrongful life actions. The essence of a wrongful life claim is that the child must be born, if at all, under some type of disadvantage. The bastard cases typically do not fall within this definition because the parents could have legitimated the child by subsequently marrying. The *Zepeda* case itself arguably meets the test because the putative father was already married, and hence unable to have legitimated the child.

56. *See, e.g.,* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

57. *See, e.g.,* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964).

58. *See, e.g.,* Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

59. *See, e.g.,* Karlsons v. Guerinot, 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977). The decision in *Park* is directly contrary to *Karlsons. Karlsons* relied upon the decision in Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966), which held that a bastard child did not state a cause of action against a state mental hospital for the hospital's negligence in permitting a sexual assault upon the child's mentally deficient mother, the act of which led to the child's birth. *Park,* however, relied upon dictum in Howard v. Lecher, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977), which expressed the view that the question of recovery by an impaired child was still open in New York.

60. *See, e.g.,* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967).

In *Zepeda v. Zepeda,*[61] a bastard child brought suit against his father claiming injury by virtue of his illegitimate status. The court concluded that the father's fraudulent promises of marriage, made to the plaintiff's mother for the purpose of inducing sexual relations, were tortious as to the child. Notwithstanding the court's conclusion that the child had been injured by the tortious acts of the father, the court refused to recognize the cause of action.[62]

After noting the large number of illegitimate births each year, the court expressed the fear that recognizing a cause of action for wrongful life would not only give rise to a flood of suits by illegitimates, it also would encourage suits by all the other children in the world who, for one reason or another, were unhappy with the conditions under which they were born. Encouraging such suits by children against their parents, the court concluded, would have wide ranging social consequences which were not proper subjects for judicial lawmaking.

The problems raised by the *Zepeda* case are applicable only if the wrongful life cause of action is directed towards a parent. If the cause of action is limited to the acts of third parties, there is no basis for the apprehension of such ramifications. Wrongful life claims, like any other tort, would come into play only when the third party breached a traditionally recognized duty. These cases typically would involve a physician who negligently failed to warn a prospective mother of the risk of birth defects.

Limiting the cause of action to claims against third parties would not require senseless distinctions. There are good reasons for denying a child a cause of action against his parents. Many states would dispose of such claims by the application of the doctrine of parental immunity.[63] Much of the reasoning that supports this doctrine is just as applicable to wrongful life cases as to any other tort. Preservation of family harmony and protection of family assets are valid grounds for distinguishing suits by children against their parents from suits against third parties.

There are also other reasons for immunizing parents that are unique to wrongful life cases. One such reason is the nature of the decisions involved. The choice to procreate is one which is pervaded by deep seated moral and religious convictions.[64] It is quite unlike a doctor's duty of disclosure,

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61. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964).

62. The willingness of the court to admit that the acts were tortious in nature and wrongful as to the child brought about a flurry of law review speculation and criticism. *See, e.g.,* 1963 U. ILL. L. F. 733 (1963); 49 IOWA L. REV. 1005 (1964).

63. For a discussion of the doctrine of parental immunity see MacDonald, *Torts—Parental Immunity Doctrine in Missouri,* 38 MO. L. REV. 699 (1973).

64. The Supreme Court has recognized the fundamental nature of the decision to procreate on numerous occasions. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) ("decision whether or not to beget or bear a child is at the

which is detached from any moral or religious considerations. It is not irrational to protect the parents in their choice to bear a child in spite of the risk of defects, yet hold a physician liable for failure to disclose such risks. The nature of the parents' choice makes subjecting it to second guessing by a jury improper.

A related reason for distinguishing between actions against third parties and actions against parents is that it may be in the best interest of the unborn child not to have a right to a cause of action against his parents. A woman has a virtually unbridled right to abort a child during the first trimester of pregnancy. Maternal love is the unborn's only sustenance during this period. The law should not risk severing this tenuous hold on life by, in essence, making the child a cause of action waiting to mature. If a mother is told that there is a ten percent chance her child will be seriously defective, she may nevertheless be willing to take the risk. If in addition the law threatened to subject her decision to review by a jury, she may feel constrained to abort a life she might otherwise have preserved.

Although the state should not impede a mother's decision to abort, it is wholly permissible to refrain from creating a cause of action which could encourage abortions. The choice to abort, as a part of a woman's right to privacy, should be a free choice, not a compelled one.

The application of rational social policies could enable courts to limit wrongful life actions to third party defendants who have breached a traditionally recognized duty. There is no reason to fear that a wrongful life cause of action, so limited, would have the far ranging social consequences feared by the majority in *Zepeda*.

In another early bastard case, *Williams v. State*,[65] an infant who was born out of wedlock to a mentally deficient mother as a result of a sexual assault upon the mother while she was confined as a patient in a state mental institution filed a claim against the state for negligently failing to prevent the assault. The court conceded that the allegations of the complaint, if true, indicated grievous neglect on the part of the state, but denied recovery because "the policy and social reasons against providing such compensation are at least as strong as those which might be thought to favor it."[66] However, the court did not articulate what the social policies were which favored either the state's breach of duty or its immunization from liability. Holding a third party liable for the results of his failure to comply with the standard of care required by law appears to further social policy, rather than contravene it.

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very heart of this cluster of constitutionally protected choices"); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

65. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

66. *Id.* at 484, 223 N.E.2d at 344, 276 N.Y.S.2d at 887.

Although the policy argument of *Williams* and the fear of vast ramifications expressed in *Zepeda* have been parroted in subsequent decisions, the principal impediment of the wrongful life cause of action is the question of damages. In *Karlsons v. Guerinot*[67] the parents of a mongoloid child filed a suit on her behalf claiming that the defendant obstetrician had failed to inform her mother of the risks of birth defects, thereby preventing the mother from making an informed choice to terminate the pregnancy. In denying the wrongful life cause of action, the court stated that in order to recognize the infant's cause of action, the court would have to find that she had been *injured* by the defendant's negligence, *i.e.*, that life with deformities, however severe, is worse than "the utter void of nonexistence."[68] This value judgment was considered beyond the scope of judicial decisionmaking. The effect of the *Karlsons* decision is to create an irrebuttable presumption that existence, no matter how onerous, is preferable to nonexistence or nonbirth.

*Karlsons* and other cases which speak of "famous persons who have had great achievement despite physical defects"[69] obviously are only considering those children born with limited defects.[70] The Park child never had a chance to experience any of the pleasures which presumably make a temporal existence worthwhile. Other cases have involved equally pathetic impairments.[71] There is no more basis to say that the value of life always outweighs the costs of life with suffering than to say that the value of a child to a parent always outweighs the cost of rearing the child.[72] If this presumption is based on public policy, then the courts have as yet failed to articulate a valid basis for such a policy.

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67. 57 App. Div. 2d 73, 394 N.Y.S.2d 933 (1977). *See* note 59 *supra* pointing out the conflict among the New York decisions.

68. *Id.* at 81, 394 N.Y.S.2d 933, 938 (1977) (quoting Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692).

69. Gleitman v. Cosgrove, 49 N.J. 22, 30, 227 A.2d 689, 693 (1967).

70. *See* Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis],* 55 MINN. L. REV. 58, 65-66 (1970).

71. *See, e.g.,* Comment, *Howard v. Lecher, An Unreasonable Limitation on a Physician's Liability in a Wrongful Life Suit,* 12 NEW ENGLAND L. REV. 819, 829 n. 73 (1977). The author describes the tragic course of Tay-Sachs disease. Although the *Howard* case did not involve a claim on behalf of the child, the facts of the case clearly suggest the invalidity of the argument that life is always preferable to nonexistence.

72. Undoubtedly at some point the agony of existence would outweigh the benefit. Moreover, as the impairment increased, the value of life seemingly would decline correspondingly. The Park child is a good example. On the one hand, she suffered substantial pain and mental torment; to offset that, she was "alive." However, breathing alone hardly would constitute a benefit. It seems implicit in the "right to die" cases such as *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), that at some point reasonable men would conclude that "life" was no longer worth clinging to. Courts have been reluctant to recognize a right to die, but the reasons for denying the existence of a right to die are not present in wrongful life cases. *See* Note, *The Right to Die a Natural Death: A Discussion of In re Quinlan*

In addition to the argument that as a matter of law there can be no damages for wrongful life, some courts have refused to recognize wrongful life claims because of the difficulty of ascertaining damages.[73] Much of this problem has been caused by the misapprehension of the courts that the child is seeking damages for life itself.[74] In the *Park* case, the court correctly noted that the child "does not seek damages for being born, per se, but rather seeks damages for the pain suffered by her *after* her birth."[75]

The conceptual problem arises because, by definition, wrongful life claims arise only where there is no alternative to being born defective, other than not being born at all. This does not, however, alter the fact that the child has suffered injury by virtue of her conscious pain and suffering. As discussed earlier, a single act can result in both a benefit and an injury.[76] This is what occurs in a wrongful life fact situation. Unquestionably the Park child was injured, but at the same time the negligent act also conferred whatever benefit accrued to the child by virtue of her birth.

If the "benefits rule" is applied, the defendant should be permitted to offset damages by showing that his negligent act conferred a benefit upon the plaintiff. The burden of producing evidence of the nature of such benefit is upon the defendant.[77] In essence, the defendant must attempt to show the extent to which the plaintiff will be capable of living a meaningful life. The jury may then take such benefit into consideration in setting the measure of damages. Ascertaining the value of such benefit would

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*and the California Natural Death Act,* 46 CIN. L. REV. 192, 196 (1977). The choice whether a child should be born with defects belongs to the parents, "[i]f one objects to awarding damages for the violation of this right, it would seem that the objection is directed either at the policy of allowing abortions . . . or at giving parents who may have conflicting motivations the authority to make this decision." Capron, *Informed Decision Making in Genetic Counseling: A Dissent to the "Wrongful Life" Debate,* 48 IND. L.J. 581, 598 (1973). Physicians would not be induced to abort "borderline fetuses" if their duty was limited to full disclosure. Friedman, *Legal Implications of Amniocentesis,* 123 U. PA. L. REV. 92, 154 (1974).

73. Despite the fact that this is often cited as a justification for denying recovery, the courts have not clearly indicated whether they are referring to the existence of damages, or merely to their measure. *See* Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Stewart v. Long Island College Hosp., 35 App. Div. 2d 531, 313 N.Y.S.2d 502 (1970), *appeal dismissed mem.,* 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863 (1970); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

74. Karlsons v. Guerinot, 57 App. Div. 2d 73, 80, 394 N.Y.S.2d 933, 937 (1977).

75. 88 Misc. 2d at 229, 387 N.Y.S.2d at 209.

76. *See* text accompanying note 31 *supra.*

77. It is a generally recognized principal of law that the defendant has the burden of proving any items of mitigation or reduction of damages. *See generally* Annot., 134 A.L.R. 242 (1941).

not seem impossible, as juries make similar determinations in jurisdictions which permit recovery for the loss of enjoyment of life.[78] As the *Park* court stated, ultimately the measure of damages should be a pragmatic determination by the trier of fact, after hearing all of the evidence.[79]

Even assuming the valuation of such benefits is beyond the ability of juries, the benefits rule is an equitable doctrine designed to prevent the unjust enrichment of a plaintiff whenever it is *equitable* to do so.[80] It would be a perversion of the benefits rule to utilize it to deny a plaintiff's recovery because the defendant cannot prove the value of the benefit he has conferred.[81]

"Decisional law must keep pace with expanding technological, economic and social change."[82] Reliable birth control methods are rather recent, and abortions were illegal in most states less than a decade ago. Parents have increasing ability to control procreation, and with these growing rights and abilities must come liability for those who negligently thwart family plans. The growth of the wrongful birth cause of action should fill this need.

However, in many cases it is not enough to compensate only the parents, for their duty to care for the child ceases at majority. *Park* has taken the first step in providing complete relief through the recognition of both wrongful birth and wrongful life actions. Even though *Zepeda* may have been correct in deferring to the legislature on the issue whether a child should be permitted to sue his parents for wrongful life, claims against third parties stand on a different footing. There is no persuasive reason for judicial abdication in wrongful life cases when a third party is the defendant.

The law is well settled that parents have the right to choose the medical treatment their children receive.[83] It is incumbent upon the courts to

78. A number of courts have recognized that the loss of enjoyment of life is an element of damages separate and distinct from pain and suffering. *See* Annot., 15 A.L.R.3d 506 (1967).

79. 88 Misc. 2d at 232, 387 N.Y.S.2d at 211.

80. The mitigation of damages is an equitable principle. Taylor v. Ford Motor Co., 392 F. Supp. 254 (W.D. Mo. 1974). Hence equitable considerations apply to whether the defendant may offset the value of any benefit conferred. RESTATEMENT OF TORTS § 920 (1939).

81. *See* Gulf, C. & S.F. Ry. v. Harbison, 99 Tex. 536 (1906). In an action for damages caused by overflows, the defendant was not entitled to show that the overflow had carried rich soil onto plaintiff's land without proving that the value of the land was enhanced by such deposits. *See generally* 25 C.J.S. *Damages* § 96 (1966).

82. Park v. Chessin, 60 App. Div. 2d at 80, 400 N.Y.S.2d at 114.

83. 59 AM. JUR. 2d *Parent and Child* § 15 (1971). This right is subject only to the state's power to intervene if the parent acts unreasonably. When abortions are involved, however, the state has no right to intervene. Roe v. Wade, 410 U.S. 113 (1973). Seemingly the choice of whether an impaired child should be born is under the absolute control of the parents.

recognize that, at least for the present, abortion is the only "cure" for many genetic defects. A doctor's negligence which prevents the parents from exercising their judgment on behalf of their child should result in liability in wrongful life cases, just as in any other malpractice suit. The choice to abort is primarily the mother's. To the extent she is deprived of her right to act for her unborn child, there should be a remedy if the interference inures to the child's detriment.[84]

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84. The decision in *Park* appears to be based on this line of reasoning. The language of the opinion suggests that the child's claim is in a sense derivative of the mother's right to choose. 60 App. Div. 2d at 80, 400 N.Y.S.2d at 114.